



Will NYC campaign law be next to fall?

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Last week, the Supreme Court struck down an Arizona law that subsidized political candidates' campaigns based on amounts spent by their unsubsidized challengers. The ruling poses serious problems for New York City's government subsidies to campaigns.

Yes, the city Campaign Finance Board rushed out a statement asserting that the city's program is fine, and noting its differences from the Arizona system. But New York may still violate some key principles the court outlined.

The case involved an Arizona law under which candidates got a government subsidy in exchange for limiting campaign spending. If an opponent chose not to take the subsidy, the state matched outlays by the opponent that exceeded the subsidy.

This, said the high court, unconstitutionally burdened the speech of candidates who ran without subsidies.

In dissent, Justice Elena Kagan argued that nonparticipating candidates could speak all they liked -- the law merely gave participating candidates more money to reply. "The program creates more speech," she wrote. No First Amendment issue here. Move along.

But Chief Justice John Roberts, writing for the majority, saw through this ruse. The program's goal wasn't to increase speech but to *limit* it, by making it worthless.

Elections are a competition with only one winner. Giving more money to the opponent every time one speaks on behalf of a favored candidate discourages the speech that triggers the matching funds.

As Roberts noted, "The professed purpose of the state law is to cause a sufficient number of candidates to sign up for public financing, which subjects them to the various restrictions on speech."

Worse, the Arizona program put the government's thumb on the scale to assure that favored candidates -- those accepting government subsidies -- wouldn't lose. For example,

in a multicandidate race, spending by a nonparticipating candidate triggered more government subsidies to *all* his participating opponents. Thus, a candidate's decision to communicate more could lead to the government's financing speech against him equal to several times his own effort.

New York City's plan differs from Arizona's in two significant ways. First, New York doesn't base subsidies on spending by independent groups. In Arizona, matching funds could be triggered on the basis of independent spending. Second, New York City only *partly* matches the nonparticipating candidate's spending above trigger and thus is a lesser disincentive for the nonparticipating candidate.

So New York City's law isn't as blatantly unconstitutional as Arizona's -- but the court's ruling plainly invites a legal challenge to the city's program. Will having a cut-rate matching-fund program be enough to save the city?

Like the Arizona plan, New York's hefty six-to-one match seems intended to push candidates into the city system, where they will then be subject to spending limits.

Furthermore, responding to the high court's ruling, Campaign Finance Board Executive Director Amy Loprest said that the city's program "provides small donors with a voice to counterbalance the impact of special interest spending." But a key part of the court's reasoning is that the state may not judge whose voices need to be "counterbalanced." It is for the voters alone to make that decision, at the ballot box.

All of which leads to the real question: Should the government be subsidizing candidates?

As former Sen. Howard Baker once noted, "There is something politically incestuous about the government financing and . . . inevitably then regulating, the day-to-day procedures by which the government is selected."

Spot-on: Government shouldn't be directly shaping the quantity and substance of the very debate that determines how voters judge that government's performance on Election Day. To do so is to fundamentally alter the relationship between the governed and the government and to seriously constrain freedom of conscience -- the right not to be forced to subsidize political beliefs with which one disagrees.

The government already uses indirect control over money to determine campaign content. The statement you see now on ads for federal office -- "I'm Joe Blow, and I approved this message" -- is there because the government dictates that candidates get a lower ad rate by including the statement.

This takes up about 12 percent of every 30-second ad -- time that could be spent to say, for example, "We have nothing to fear but fear itself" or "Give me liberty or give me

death." But Congress prefers that candidates say, "I approve this message."

Why? According to Sen. John McCain, "to cut way down on these negative ads." Negative ads, not coincidentally, tend to benefit challengers more than incumbents.

That campaigns should be independent of government should be as basic to our constitutional jurisprudence as the separation of civilian and military authority or the separation of church from government subsidies and dominance. Call it "separation of campaign and state." The Supreme Court has moved us closer to that goal, and that is a good thing for American democracy.

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